

INQUIRY CONCERNING JUDGE,
NO. 96

IN RE:	§	BEFORE THE
HONORABLE SHARON KELLER,	§	COMMISSION ON
PRESIDING JUDGE OF THE TEXAS	§	JUDICIAL CONDUCT
COURT OF CRIMINAL APPEALS,	§	
AUSTIN, TRAVIS COUNTY, TEXAS	§	

**THE HONORABLE SHARON KELLER’S OBJECTIONS
TO THE SPECIAL MASTER’S FINDINGS OF FACT**

**TO THE HONORABLE COMMISSIONERS OF THE STATE COMMISSION ON
JUDICIAL CONDUCT:**

Respondent, the Honorable Sharon Keller, respectfully files this, her Objections to the Special Master’s Findings of Fact. Respondent requests that the Commission disregard the findings to which Respondent objects, but otherwise adopt the Special Master’s findings in their entirety.

I. Introduction.

From August 17 through August 20, 2009, Special Master David A. Barchelmann, Jr. conducted an evidentiary hearing of the above-captioned matter in San Antonio, Texas, pursuant to the Procedural Rules for the Removal or Retirement of Judges. The Special Master’s January 19, 2010, Findings of Fact completely exonerate Judge Keller of all of the charges filed against her by the Examiner and absolve her of the calumny of the Examiner’s allegations. As Judge Barchelmann found, Judge Keller “did not violate any written or unwritten rules or laws” and her conduct “does not warrant removal from office, or even further reprimand beyond the public humiliation she has surely suffered.” Findings, p. 16.

The Procedural Rules for the Removal or Retirement of Judges provide that the Special Master was to “transmit to the Commission a report which shall contain a brief statement of the proceedings had and his findings of fact based on a preponderance of the evidence *with respect to the issues presented by the notice of formal proceedings and the answer thereto[.]*” P. R. for Removal or Retirement of Judges, R. 10(h)(1) (emphasis added). In this regard, it is important to recall the conduct charged by the Examiner in her First Amended Notice of Formal Proceedings, filed June 15, 2009, on which the August 2009 hearing was held and to which the Special Master’s findings were to be directed, for it is those charges which in the first instance define the scope of relevant evidence and, therefore, relevant findings:

CHARGE I

Judge Keller’s failure to follow CCA’s Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard’s right to be heard, constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as judge of the CCA and as the Presiding Judge, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Article 1, Section 13 of the Texas Constitution, (iv) Canon 2A of the Texas Code of Judicial Conduct, (v) Canon 3B(8) of the Texas Code of Judicial Conduct, (vi) Canon 3C(1) of Texas Code of Judicial Conduct, and (vii) Canon 3C(2) of the Texas Code of Judicial Conduct.

CHARGE II

Judge Keller’s failure to follow CCA’s Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard’s right to be heard, constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Article 1, Section 13 of the Texas Constitution, (iv) Canon 2A of the Texas Code of Judicial Conduct, (v) Canon 3B(8) of the Texas Code of Judicial Conduct,

(vi) Canon 3C(1) of Texas Code of Judicial Conduct, and (vii) Canon 3C(2) of the Texas Code of Judicial Conduct.

CHARGE III

Judge Keller's conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to the law. Judge Keller's conduct constitutes willful or persistent conduct that is clearly inconsistent with the proper performance of her duties as a judge of the CCA and as the Presiding Judge, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Article 1, Section 13 of the Texas Constitution, (iv) Canon 2A of the Texas Code of Judicial Conduct, (v) Canon 3B(8) of the Texas Code of Judicial Conduct, (vi) Canon 3C(1) of Texas Code of Judicial Conduct, and (vii) Canon 3C(2) of the Texas Code of Judicial Conduct.

CHARGE IV

Judge Keller's conduct on September 25, 2007, did not accord Mr. Richard access to open courts or the right to be heard according to law. Keller's conduct constitutes willful or persistent conduct that casts public discredit on the judiciary or the administration of justice, in violation of the standards set forth, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Article 1, Section 13 of the Texas Constitution, (iv) Canon 2A of the Texas Code of Judicial Conduct, (v) Canon 3B(8) of the Texas Code of Judicial Conduct, (vi) Canon 3C(1) of Texas Code of Judicial Conduct, and (vii) Canon 3C(2) of the Texas Code of Judicial Conduct.

CHARGE V

Judge Keller's failure to follow CCA's Execution-day Procedures on September 25, 2007, and failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard's right to be heard, constitutes incompetence in the performance of duties of office, in violation of the standards set forth in (i) Article 5, Section 1-a(6)A of the Texas Constitution, (ii) 33.001(b) of the Texas Government Code, (iii) Article 1, Section 13 of the Texas Constitution, (iv) Canon 2A of the Texas Code of Judicial Conduct, (v) Canon 3B(8) of the Texas Code of Judicial Conduct, (vi) Canon 3C(1) of Texas Code of Judicial Conduct, and (vii) Canon 3C(2) of the Texas Code of Judicial Conduct.

In sum, as the charges demonstrate on their face, the Examiner charges Judge Keller with three acts of misconduct: (1) failure to follow the so-called Execution-Day Procedures of the Texas Court of Criminal Appeals, (2) “failure to require or assure compliance by the CCA General Counsel and clerk staff with respect to Mr. Richard’s right to be heard,” and (3) denying “Mr. Richard access to open courts or the right to be heard according to law,” in violation of (1) the Canons of the Texas Code of Judicial Conduct, (2) the Texas Constitution, and (3) the Texas Government Code.

The Special Master’s Findings of Fact plainly absolve Judge Keller of all of the charges leveled against her by the Examiner; the Findings of Fact can only be read as an exoneration of her conduct. Nonetheless, the Examiner has elected to exercise her prosecutorial discretion and challenge the Special Master’s Findings of Fact. In her Objections to the Special Master’s Findings of Fact, the Examiner asserts that Judge Berchermann made nine “findings of improper conduct by Presiding Judge Keller.” Examiner’s Objections, p. 2. Respondent does not share the Examiner’s view that all of the Special Master’s observations of the nine listed facts constitute “findings” as contemplated under the applicable rules – and certainly not “findings of improper conduct” – but Respondent will treat them as such for the purposes of these Objections.

As shown below, the Special Master’s findings cited by the Examiner relate to conduct that was not charged by the Examiner and not made sanctionable by the Canons of the Texas Code of Judicial Conduct, the Texas Constitution, or the Texas Government Code, and therefore are irrelevant and inappropriate findings for the Special Master to make and this Commission to consider.

II. Respondent's Objections to the Special Master's Erroneous Findings.

A. Respondent objects to the finding that Judge Keller “exhibited poor judgment in not reminding [CCA General Counsel Edward] Marty of the TCCA’s execution day procedure and in failing to notify Judge Johnson of the TDS’s [Texas Defender Service’s] communication[.]” Findings, pp. 9-10.

This finding is not relevant to the charges brought against Judge Keller. Judge Keller is not charged with “exhibit[ing] poor judgment;” she is accused of violating written, mandatory standards of behavior – the Canons of the Texas Code of Judicial Conduct, the Texas Constitution, and the Texas Government Code, as recited above in the Examiner’s charges. In that regard, the Special Master explicitly found, based on a thorough and careful review of the evidence, that Judge Keller “did not violate any written or unwritten rules or laws,” including the CCA’s Execution-day Procedures (which he correctly characterized as an “oral tradition”). Findings, pp. 7, 9, 16. Neither the Canons of Judicial Ethics, the Texas Constitution, the Texas Government Code, nor the so-called execution-day procedures required Judge Keller to “remind” Marty of anything, nor did any of those laws, rules, or procedures require Judge Keller to contact Judge Johnson. In addition, there was no evidence to support this finding, and certainly no clear and convincing evidence, which is the appropriate standard. Accordingly, this finding should be disregarded.

B. Respondent objects to the finding that Judge Keller “certainly did not exhibit a model of open communication. She should have been more forthcoming with Marty that he should, at a minimum, notify Judge Johnson of the TDS’s call. She also

could have called Judge Johnson herself, for she knew that Judge Johnson was the assigned judge for the Richard matter that day.” Findings, p. 11.

Again, this finding is irrelevant to the charges leveled against Judge Keller by the Examiner. Neither the Canons of the Texas Code of Judicial Conduct, the Texas Constitution, the Texas Government Code, nor the “oral tradition” of CCA execution-day procedures requires, or even mentions, “open communication” or that any judge has any duty to tell the Court’s General Counsel to call another judge, or that any judge must notify a colleague of a telephone call. This finding is completely irrelevant to the laws, rules, and procedures the Examiner charges Judge Keller of violating. In addition, there was no evidence to support this finding, and certainly no clear and convincing evidence, which is the appropriate standard. Accordingly, this finding should be disregarded.

C. Respondent objects to the finding that “Judge Keller’s conduct . . . was not exemplary of a public servant. She should have been more open and helpful about the way in which the TDS could present the lethal injection claim to the TCCA.” Findings, p. 15.

This finding is also not relevant to any of the charges brought against Judge Keller. Judge Keller is not accused of insufficient openness or helpfulness – she is accused of violating specific constitutional, statutory, and codified rules of judicial conduct – with all of which, it need be repeated, she was found by the Special Master to have complied. In addition, there was no evidence to support this finding, and certainly no clear and convincing evidence, which is the appropriate standard. Accordingly, this finding should be disregarded.

D. Respondent objects to the finding that Judge Keller “should have directed the TDS’s communication to Judge Johnson.” Findings, p. 15. This finding is identical to the finding to which objection is made in section II.A., above, which objection is repeated and incorporated herein by reference. In addition, there was no evidence to support this finding, and certainly no clear and convincing evidence, which is the appropriate standard.

E. Respondent objects to the finding that Judge Keller’s “judgment in not keeping the clerk’s office open past 5:00 to allow the TDS to file was highly questionable.” Findings, pp. 15-16.

This finding is irrelevant to the Examiner’s charges against Judge Keller, because none of the constitutional provisions, statutes, codes of conduct, or even the oral tradition of the CCA, required the clerk’s office to be kept open past 5:00 p.m. on the day of Mr. Richard’s execution.

More importantly, this finding is not supported by the evidence. The absolutely undisputed evidence proved that the CCA’s clerk’s office closes at 5:00 p.m. *pursuant to state law*. (Resp. Ex. 48 (Tex. Gov’t Code § 658.005).) Likewise, the unanimous testimony was that the clerk’s office had *never* been kept open past 5:00 p.m. on an execution day (or any other day). (C. Johnson Testimony, Tr. at vol.2, 112:3-5, 112:18-113:2; S. Keller Testimony, Tr. vol. 4 at 13:8-13; 44:23-45:1; E. Marty Testimony, Tr. vol. 4 at 116:5-8; R. Greenwood Testimony, Tr. at vol. 5, 10:16-18.) Based on this undisputed testimony, the Special Master found that “[t]he TCCA had never kept the clerk’s office open past 5:00 on an execution day.” Findings, p. 9.

Furthermore, as the Special Master found (Findings, p. 10), the undisputed evidence proved that there was no reason to keep the clerk's office open after 5:00 p.m., because after-hours filings are expressly authorized by Rule 9.2(a)(2) of the Texas Rules of Appellate Procedure which states:

(a) A document is filed in an appellate court by delivering it to:

(1) the clerk of the court in which the document is to be filed; or

(2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.

(Resp. Ex. 47.) Accordingly, the Special Master found that Richard's lawyers could have filed their papers with the CCA after hours, regardless of whether the clerk's office remained open past 5:00 p.m. *See* Findings, pp. 10-11. Indeed, the Examiner admitted that "a stay of execution could have been filed with any CCA judge on September 25, 2007 after 5 p.m[.]" (Resp. Ex. 73, at 5.)

There was no evidence to support this finding, and certainly no clear and convincing evidence, which is the appropriate standard. Accordingly, because this finding is both irrelevant to the charges filed against Judge Keller and because it is not supported by the record, it should be disregarded.

F. Respondent objects to the finding that "there is a valid reason why many in the legal community are not proud of Judge Keller's actions." Findings, p. 16. This finding is not relevant to the charges asserted against Judge Keller, as she is not accused of having failed some popularity contest among Texas lawyers. Furthermore, this finding rests upon the predicate finding that the "uproar" against Judge Keller in the legal community was generated by false and misleading statements by Richard's lawyers. *See* Findings, pp. 13-14. There was no evidence to support this finding, and certainly no

clear and convincing evidence, which is the appropriate standard. Therefore, there is insufficient evidentiary support for this finding and it should be disregarded.

G. Respondent objects to the finding that “Judge Keller’s silence on several occasions conflicts with the ideal that courts should foster open communication among court staff and litigants.” Again, this finding is completely unrelated and irrelevant to any of the constitutional, statutory, and codified rules of judicial conduct Judge Keller is accused of violating – but which the Special Master found she did not violate. In addition, there was no evidence to support this finding, and certainly no clear and convincing evidence, which is the appropriate standard. Therefore, this finding should be disregarded.

H. Respondent objects to the finding – if it is a finding, rather than a passing observation – that, absent the violation of a formal rule or statute does not mean that Judge Keller is “absolve[d]” of “responsibility to ensure that the courts remain fair and just.” Findings, p. 16. Of course, Judge Keller does not deny that she is obligated by law and by her own personal convictions to ensure that she act fairly and justly. Here, the Special Master has made no finding otherwise; rather, he found that Judge Keller did not violate any rule, statute, or code of conduct, written or unwritten, and Judge Keller accepts that finding with gratitude. The Special Master’s qualification quoted above, however, might be misconstrued by those with malicious intent to constitute a “finding” of misconduct against Judge Keller, and to that irresponsible reading of the Special Master’s findings Judge Keller objects.

I. Respondent objects to the finding that “[a]lthough [Judge Keller] says that if she could do it all over again she would not change any of her actions, this cannot be

true.” Yet again, and for the last time, this finding is not relevant to the charges the Examiner has brought against Judge Keller. None of the constitutional, statutory, and codified rules of judicial conduct Judge Keller is accused of violating concerns expressions of regret or predictions of future conduct. Furthermore, when Judge Keller testified that she would not change her conduct if presented with *exactly the same factual situation as she was presented on September 25, 2007*, she meant exactly what she said. She did not testify that, if she knew today what she knew then, nor if she knew that TDS would disseminate false information about her, she would act the same way today – rather, she simply reaffirmed her conviction that, under the circumstances of which she was aware at the time, she believes she acted properly:

Q. *Knowing what you knew then*, and we've talked about a variety of things that you knew on September 25, 2007, have we not?

A. Yes, we have.

Q. *And based on the specific things Ed Marty said to you and asked of you on September 25, 2007*, is it correct that there is nothing different you would do if the same questions were put to you today than you did on September 25, 2007?

A. Yes, that is correct.

(S. Keller Testimony, Tr. at vol. 4, 28:25-29:8 (emphasis added).)

The Special Master’s finding that Judge Keller would have acted differently was predicated on Judge Keller’s already “having gone through this ordeal.” Findings, p. 15. Judge Keller was not, however, asked how she would respond to similar facts with the benefit of hindsight and after having endured the malicious and inaccurate attacks mounted against her (described in the Special Master’s findings at pp. 13-14). Judge Keller was asked, rather, whether she made the right call at the time. She said yes – and the Special Master does not find otherwise. As just demonstrated, there was no evidence

to support this finding, and certainly no clear and convincing evidence, which is the appropriate standard. Accordingly, the Special Master's observation that Judge Keller would have acted differently with the benefit of hindsight should be disregarded as irrelevant and not supported by the record.

III. Conclusion.

For the reasons set forth above, Respondent respectfully objects to the findings of fact listed in subsections II.A. through II.I., above, and requests that the Commissioners disregard each and every one of those findings. Respondent respectfully requests that the Commissioners adopt the remainder of Special Master Berchelmann's findings of fact in their entirety.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: /s/ Charles L. Babcock

Charles L. Babcock
State Bar No. 01479500
Email: cbabcock@jw.com
1401 McKinney, Suite 1900
Houston, Texas 77010
(713) 752-4200
(713) 752-4221 – Fax
Kurt Schwarz
State Bar No. 17871550
901 Main St., Ste. 6000
Dallas, Texas 75202
(214) 953-6000
(214) 953-5822 – Fax

**ATTORNEYS FOR RESPONDENT
THE HONORABLE SHARON
KELLER**

CERTIFICATE OF SERVICE

This is to certify that on this February 17, 2010, a true and correct copy of the foregoing document was served via electronic transmission to:

Ms. Seana Willing
State Commission on Judicial Conduct
P.O. Box 12265
Austin, Texas 78711

Mr. John J. McKetta, III
Graves Dougherty Hearon & Moody
401 Congress Ave., Suite 2200
Austin, Texas 78701

/s/ Charles L. Babcock